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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
AND
RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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Respondent, Department of Game of the State of Washington, respectfully submits that the single issue presented in the petitioners' request for Writ of Certiorari cannot adequately resolve this litigation, which was commenced 13 years ago. If certiorari is granted, it should, therefore, include the issues which were addressed by the Washington

State Supreme Court in construing the Treaty of Medicine Creek (10 Stat. 1132 (1854)) and should not be confined to the limited issue asserted by Puyallup Tribe, Inc. and Ramona Bennett, petitioners.

OPINION BELOW

The opinions of the Supreme Court of the State of Washington (*Dept. of Game, et al. v. Puyallup Tribe, Inc.*,[1] 86 Wn. 2d 664, 548 P. 2d 1058 (1976)) and the trial court, the Superior Court of Pierce County, are set forth in Appendices B-E of the petitioners' Petition for a Writ of Certiorari. This court has on two prior occasions rendered decisions in this case; *Puyallup Tribe v. Dept. of Game of Washington*,[2] 391 U.S. 392 (1968), and *Dept. of Game of Washington v. Puyallup Tribe*,[3] 414 U.S. 44 (1973). The prior decisions of the Washington Supreme Court in this same case are *Dept. of Game, et al. v. Puyallup Tribe*,[4] 70 Wn. 2d 245, 422 P. 2d 254 (1967), and *Dept. of Game v. Puyallup*,[5] 80 Wn. 2d 561, 497 P. 2d 171 (1972).

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3).

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[1]Hereinafter referred to as *Puyallup III*, 86 Wn. 2d 664.
[2]Hereinafter referred to as *Puyallup I*, 391 U.S. 392.
[3]Hereinafter referred to as *Puyallup II*, 414 U.S. 44.
[4]Hereinafter referred to as *Puyallup I*, 70 Wn. 2d 245.
[5]Hereinafter referred to as *Puyallup II*, 80 Wn. 2d 561.

TREATIES AND STATUTES INVOLVED

The treaties and statutes involved are set forth in Appendix A to the petitioners' Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. *Nature of Proceedings.*

This Court in 1973 (*Puyallup II*, 414 U.S. 44) reversed a decision of the Washington State Supreme Court (*Puyallup II*, 80 Wn. 561, 497 P. 2d 171) as it related to the steelhead fishery and remanded for further proceedings consistent with the decision of this Court. That decision set forth two issues:

(1) "If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sport fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables— * * *" (414 U.S., *supra*, at 48.)

(2) This Court specifically reserved ruling on the issue of whether hatchery fish can be excluded from the apportionment referred to above (Chief Justice Burger and Justices White and Stewart in a concurring opinion stated that the State of Washington is not obligated to subsidize the Indian fishing with planted fish paid for by sports fishermen. *Supra*, at 49).

Pursuant to the direction of this Court, on re-

mand, the state courts have concluded that hatchery fish are not included within the total available for apportionment between treaty and nontreaty persons. The state courts have further decreed that treaty fishermen are entitled to 45% of the harvestable natural run of steelhead.

STATEMENT OF POSITION

Only this Court can resolve the conflicts arising by virtue of contradictory interpretation of *Puyallup II* (414 U.S. 44) by the Washington State Supreme Court and the United States District Court for Western Washington. A senior Judge for the United States District Court for Western Washington in other litigation involving the state has announced his intention to independently examine and decide the issues which have been decided by the Washington State Supreme Court pursuant to the remand by this Court. The same United States District Court was critical of this Court's decision in Puyallup II. See, *U.S. v. Washington*, 384 F. Supp. 312, at 334-339 (W.D. Wash. 1974) (aff'd 520 F. 2d 676 (9th Cir. 1975) cert. den. 96 S. Ct. 877 (1976)).

The State Supreme Court has specifically stated that the ultimate disposition is vested with this Court, (B-32,[1] *Puyallup III*, 86 Wn. 2d 664, 681) and further stated:

> "The first phase of our opinion is held in abeyance pending a final disposition of the treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary." (*Supra*, at 688, B-44)

[1]Citations in this form refer to the petitioners' Appendix.

The parties, the Washington State Supreme Court, and the public are looking to this Court for a judicial declaration which will resolve the issues presented by this case. It is only this Court which can ultimately resolve the differences which are occurring in our dual court system (state and federal) respecting these issues.

The importance of this case is reflected by the number of Indian treaties[1] within the State of Washington which are virtually identical[2] with the Treaty of Medicine Creek, *supra*, and thus the interpretation of this treaty by this Court has an impact beyond the scope of the Puyallup River.

HISTORY OF THE PROCEEDING

In 1963 the Washington State Game Department and the Department of Fisheries commenced this action, requesting a declaratory judgment seeking to determine what rights, privileges or immunities individuals who purported to be members of the Puyallup tribe possessed with reference to the exercise of the state's laws regulating fishing in the Puyallup River and adjacent waters. The pertinent

[1]Treaty of Point Elliott, 12 Stat. 927 (1855); Treaty with the Makah, 12 Stat. 939 (1855); Treaty with the Quinaielt 12 Stat. 971 (1855).

[2]The following treaties have some notable differences in language: Treaty with Yakimas, 12 Stat. 951 (1855); Treaty with Walla Wallas, 12 Stat. 945 (1855).

provision of the Treaty of Medicine Creek (December 26, 1854), (10 Stat. 1132) is Article III, which provides:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter."

In August, 1965, the trial court concluded that neither the Puyallup Tribe, nor a Puyallup Reservation, existed and thus there were no treaty rights for individuals who were members of the Puyallup organization. The State Supreme Court decided in *Puyallup I*, 70 Wn. 2d 245 (1967), that the trial court lacked jurisdiction to consider whether the tribe existed. The Court concluded that although the Puyallup Reservation no longer existed, the Puyallup Indians have a treaty right to fish at usual and accustomed grounds. Those rights were not absolute but were subject to the state's exercise of police power provided the state's regulations were reasonable and necessary for conservation. The court further concluded that the state had sustained its burden in establishing that the continued use of set and drift nets would result in the nearly complete destruction of fish runs in the Puyallup River. (*Supra*, at 261)

This Court took jurisdiction in *Puyallup I*, 391 U.S. 392 (1968), and concluded that the Indian treaty fishing rights are subject to the state's exercise of its police power, noting, *supra*, at 398, that the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the state in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. This Court indicated the standard for exercising state power with respect to Indian treaty fishing rights was whether the regulations were reasonable and necessary for conservation. The proceeding was remanded to make ultimate findings on the conservation issue with the further direction that those findings should also cover the issue of equal protection implicit in the phrase "in common with." (*Puyallup I, supra*, at 403)

The remand proceeding, commonly referred to as *Puyallup II*, commenced before Pierce County Superior Court in August, 1970. In the remand proceeding, the Department of Fisheries and the Department of Game took different legal positions. The Department of Fisheries construed this Court's decision in *Puyallup I*, 391 U.S. 401, to mean that the Indians had a greater right to participate in the off-reservation fishery than other citizens of the state. Consistent with that position, the Department of Fisheries established special fishing periods for Indians and imposed some restrictions on the commer-

cial fishery by non-Indians in Puget Sound to permit a greater number of fish to reach the areas where the Puyallup Indians engage in their fishing activities. In contrast, the Department of Game construed the same language by this Court, placing weight on the reference to "equal protection implicit in the phrase 'in common with' " (*supra* at 403) and equated this with the Fourteenth Amendment to the United States Constitution. The Department of Game's position, therefore, was that the Puyallup Indian treaty fishing rights were no greater than those of non-Indians and, accordingly, did not permit any commercialization of steelhead by the Indian fishery, since steelhead under state law since 1933 have not been permitted to be sold as a commercial fish, nor caught by other than a hook-and-line fishery.

The state superior court concluded that the state had a responsibility to recognize Indian fishing rights as superior to those of the other state citizens. The regulations adopted by the Department of Fisheries were upheld as being reasonable and necessary for conservation. All parties in that proceeding sought review by the State Supreme Court.

In *Puyallup II*, 80 Wn. 2d 561 (1972), the State Supreme Court essentially affirmed the position of the Department of Fisheries. But the court rejected the Department of Game's contention that Indians' fishing rights are not superior to other citizens. However, upon an examination of the record, it concluded there was justification for the complete prohibition

of any net fishery for steelhead in the Puyallup River for the year 1970. The Court concluded that the Department of Game would be obligated to annually review the steelhead runs on the Puyallup River and, if there was a surplus of fish over that necessary for escapement and the hook-and-line sports fishery, then a net fishery for Indians must be permitted.

The Department of Game sought and this Court granted review of steelhead fishing on the Puyallup River. No party sought to review the state court decision involving the Department of Fisheries. It should be noted and emphasized that the Department of Fisheries' regulations did not apportion any specific percentage or quota of fish to the Indian fishery.

Justice Douglas, writing on behalf of this Court in *Puyallup II*, 414 U.S. 44 (1973), reasserted the proposition that Indian off-reservation fishing rights are subject to state regulation but those regulations must be reasonable and necessary for conservation and not discriminatory. The court concluded there was discrimination because an Indian net fishery was barred and only a hook-and-line fishery, entirely preempted by non-Indians, was allowed. The discrimination resulted from permitting the entire sports fishery to be considered before the Department of Game would be required to permit any Indian net fishery for surplus fish. We note there was nothing in the record to support the conclusion that the Indians were excluded from the sports fishery.

The record made in this remand proceeding clearly establishes that Indians are permitted, and do[9] participate in the hook-and-line fishery on the same basis as all other citizens with the further provision that they are not required to obtain a state license in their ceded areas. (F.F. IV, D-9)

The majority opinion specifically reserved ruling on the question of whether hatchery planted steelhead are subject to Indian treaty fishing rights, or whether such fish can be excluded from a special Indian fishery. Three judges, in a concurring opinion, Justices White, Stewart and Chief Justice Burger, concluded that hatchery-planted steelhead are not subject to the Indian treaty fishery. This Court did not establish a formula or quota for determining the steelhead harvest by Indian fishermen stating:

> Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like. The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. (*Puyallup II*, 414 U.S. at 48-49.)

This Court's decision was announced November 19, 1973. The Department of Game promptly on November 29, 1973, adopted regulations specifically permitting a net fisheries by Indians for steelhead. (F.F. XX, D-18)

STATEMENT OF THE CASE ON THE REMAND PROCEEDING

Steelhead, an anadromous fish, are naturally spawned in fresh water streams and rivers and normally after two years in the fresh water environment migrate to salt water for a two-year period. (F.F. V, D-10) A majority of the returning steelhead, after two years in salt water, return to the fresh watershed from which they originated and spawn to propagate the next generation. Approximately 5% of those steelhead survive the spawning activity and again migrate to salt water.

The state of Washington has classified steelhead as a game fish (RCW 77.08.020) since 1933, and its citizens are not permitted to commercialize or fish for steelhead by other than a hook-and-line fishery (RCW 77.16.040).[10] The state requires its citizens

[9]Testimony by Ramona Bennett, chairperson, Puyallup Tribal Council, that tribal members participate in the sport fishery.

[10]The commercial fisheries in the Columbia River for various salmon species do catch, on an incidental basis, steelhead.

to acquire a fishing license ($7.50) and a $2.00 annual steelhead punchcard to engage in the fishery for steelhead. (See, RCW 77.32.010 and 77.12.031) (F.F. IV; D-9) There are exceptions provided from the payment of license fees to those who are under the age of sixteen, over the age of seventy who have been residents of the state for ten years, certain disabled veterans and treaty Indians fishing within their ceded areas. See, RCW 77.32.010, 77.12.230; *Tulee v. Washington*, 315 U.S. 681 (1942). The license fees which are charged the citizens of the state are placed in the state game fund (RCW 77.12.170) and cannot be used for any purpose other than "the protection, propagation and restoration of wildlife and game and the expenses of administration of the department." (F.F. IV; D-9)

The steelhead resource in Western Washington is relatively small in size compared with the various species of salmon. For example, in 1971 the steelhead catch represented 3.3% of the total steelhead and salmon catch, the respective numbers being 246,000 steelhead and 7,777,000 salmon. Steelhead fishing occurs in 170 to 180 rivers and streams of the state of Washington. Expert witnesses testifying in this remand proceeding both on behalf of the plaintiffs and defendants agreed that so long as there is only a hook-and-line fishery as contrasted with a net fishery for steelhead, there is no need for comprehensive records and data on the steelhead resource. The reason is that the inefficiency of the hook-and-line fishery

is such that a reasonable escapement of steelhead will occur for spawning purposes, resulting in a reproduction of the following generations of steelhead. (F.F. VII; D-11) The introduction of a net fishery for steelhead and the management of the same will require the development of more comprehensive information and data than has been compiled in the past. Mr. Heckman, biologist for the defendants, indicated it will probably take three to five years and the expenditure of hundreds of thousands of dollars to develop sufficient data and information to accurately predict in advance run sizes of steelhead to the various watersheds, which is a necessary element in the effective management of a net fishery.

The Department of Game has been engaged for a number of years in a substantial hatchery program to enhance the production of steelhead in the state of Washington. (F.F. IX, D-12) The hatchery program utilizes eggs taken from steelhead, the eggs are hatched and the fish are reared in hatcheries and rearing ponds in various locations in the state of Washington. The state provides food for these hatchery steelhead and normally at the end of one year hatchery steelhead have reached what is referred to as smolt size and are ready to commence migration to salt water. Such smolt are normally approximately 6 to 8 inches in length. (F.F. IX; D-12) In the natural habitat it normally takes two years for steelhead to reach smolt stage. The consistency of water temperature and availability of food shortens this

period to one year in the hatchery program. The hatchery smolts are placed in the watershed at various locations at a time when they are ready to migrate to salt water, normally occurring between April 15th and May 15th on the Puyallup River. This planting program coincides with the natural outward migration of native steelhead smolt and the hatchery planted smolts spend very little time in the fresh watershed.

The Department of Game's hatchery program involves some eighteen hatcheries and nine rearing ponds, with a capital replacement value of $33,652,-241. (F.F. IX, D-12) The annual operational costs of the department for the total steelhead program, fiscal year July 1, 1972 through June 30, 1973, were $1,636,247. (F.F. IX, D-12) The sources of revenue for these expenditures consist of license fees imposed upon citizens of the state as user fees (67%), federal financing of various programs (4%), and from mitigation funds (29%). The total hatchery program of the Department of Game has an annual capacity of approximately 5,000,000 smolts, with nearly 3,000,000 of these being winter-run steelhead.

The Department of Game started planting hatchery steelhead in the Puyallup River in 1933, the year the department was created. (F.F. X, D-12) The planting of hatchery steelhead in the Puyallup River became a substantial and regularly followed program commencing in 1948 to the present time.

All of the hatchery steelhead planted in the Puyallup River originate from eggs secured from the South Tacoma Hatchery located on Chambers Creek which is separate and apart from the Puyallup River. This South Tacoma Hatchery is totally financed by state funds and has a current replacement value of $2,531,795.

The direct investment in the steelhead hatchery program on the Puyallup River for the 1972-73 fiscal year was $27,991. During the year 1973, the department planted in the Puyallup River 75,000 steelhead smolts. The normal rate of return of adult steelhead from their salt water environment is approximately 10%, thus reflecting a projected return of 7,500 hatchery fish to the Puyallup River two years after their plant in 1973. (F.F. V, D-10) This reflects a direct investment by the Department of Game of $3.72 per returning adult hatchery steelhead to the Puyallup River. All of the funds used for this planting program on the Puyallup River are state funds derived from the state game fund which in turn is principally dependent upon license fees imposed on user groups." The benefits of these expenditures is reflected by the trial court finding (F.F. XI, D-14), which is strongly supported by the record, that at the present time slightly in excess of 50% of the total steelhead run in the Puyallup River consists of first generation hatchery propagated steelhead.

The recreational hook-and-line fishery for steelhead as previously noted is an inefficient fishery in

the sense of comparing effort to catch. A survey taken during the 1973-74 fishing season on the Puyallup River resulted in some 3,243 persons being actually observed engaging in the hook-and-line fishery for steelhead. At that time those individual fishermen were interviewed, and the interviews reflected that the fishermen at the time of the interview had fished some 9,059 hours (F.F. XIX, D-19). To reflect additional fishing time after the interviews and also to reflect fishermen who were not observed and not "interviewed" a formula explained in the record produced an estimate that for the 1973-74 steelhead season on the Puyallup River, consisting of 121 days, sports fishermen spent 92,514 man hours to catch an estimated 4,354 steelhead.

There are approximately 850 members of the Puyallup Tribe, of which 320 are over the age of 21. Twenty Puyallup tribal fishermen fish essentially full-time with another twenty being basically part-time fishermen and, lastly, an additional twenty who only occasionally participate in the fishery. The majority of the Indian fishery is for salmon (F.F. XV, D-16), with the catch of salmon exceeding steelhead on a ratio of approximately 10 to 1. Steelhead which are caught in the Puyallup River average six to eight pounds with a commercial value of approximately $10. While it is difficult to ascertain the In-

[11]The only exception to this statement in the last 20 years was a $3,000 grant of federal anadromous fish funds from the U.S. Fish and Wildlife Service to fund a portion of a study conducted by Mr. John Hisata of the Department of Game in 1972-73 re a creel census on the Puyallup River.

dian catch on the Puyallup River during the 1973-74 seasons, it appears to have been in the neighborhood of 2,500 to 3,000 steelhead.[12]

As previously indicated, the Department of Game promptly following this Court's decision in *Puyallup II*, 414 U.S. 44, adopted regulations specifically permitting a net fishery by Indians for steelhead in the Puyallup River. The special season under that regulation terminated on January 17, 1974, but the Puyallup Tribe continued to fish following the termination of the regulation. They testified that they did not feel nor consider themselves bound by state regulations. That position by the tribe has continued notwithstanding the decision by the state court on the remand of this proceeding. On February 27, 1976, the Pierce County Superior Court found that the tribe and the tribal officers were in contempt for failure to comply with court orders prohibiting them from encouraging or participating in a fishery for steelhead after tribal members had caught the apportionment of the steelhead run decreed by the superior court. The court did not impose any sanctions as a result of its judgment for contempt.

The record in this case shows that the tribe has no enforcement officers and depends upon its own

[12]The fish coordinator for the Puyallup Tribe testified to a range of 2,000 to 2,500. The biologist testifying on behalf of the tribe indicated an Indian reported catch of 1,800 steelhead as of January 7, 1974, and the chairwoman of the tribe reported a tribal catch of approximately 700 after January 7, 1974. The biologist testifying on behalf of the Department of Game indicated a catch of approximately 3,000 steelhead.

fishermen for determining what modifications will be made in Indian fishing regulations. The record further establishes that although the tribe depends in substantial part upon professional advice received from the United States Fish and Wildlife personnel, they have rejected suggestions made by such personnel for reduction in tribal fishing efforts.

REASONS IN SUPPORT

Summary of Argument

The Washington state courts have acted in response to the remand directions of this Court to apportion the steelhead fishery between treaty and nontreaty fishermen. In order to make that apportionment it was necessary to determine which fish were subject to the apportionment. Thus, the state courts had to resolve:

(1) Whether hatchery-planted fish were subject to the treaty right; and

(2) What portion of the steelhead run for conservation reasons could not be harvested.

Notwithstanding the resolution of these issues by the Washington State Supreme Court, a senior Judge of the United States District Court for Western Washington has indicated an intention to commence an independent evaluation of the same issues. On the basis of past rulings, a conflict appears imminent between the state and federal district courts on these issues.[13] Both the State Supreme Court and

[13]See the Response of the Intervenor Northwest Steelheaders Council of Trout Unlimited for a number of conflicts between state and federal court rulings.

the United States District Court have recognized that they are bound by and must follow decisions of this Court. In *United States v. Washington*, 384 F. Supp., *supra*, at 339, after having engaged in an extensive criticism of this court's decision in *Puyallup II*, 414 U.S. 44, the court stated:

> In the opinion of this court, judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic or personal misgivings, to enforce and apply every principle of law as it is directly stated in a decision of the United States Supreme Court.

In a similar manner, the Washington State Supreme Court in *Puyallup III*, 86 Wn. 2d, *supra*, at 681, after reexamining *Puyallup II*, 414 U.S. 44, and disagreeing with the conclusions expressed therein:

> "For this reason, we have rendered the decision above as the first phase of our opinion. We recognize that the ultimate disposition of the treaty interpretation question is, however, vested with the United States Supreme Court. Moreover, we feel constrained by the express language on the fact of Puyallup II, when considered independently of Puyallup I, to defer to the statement in Puyallup II, recognizing an Indian right to a net fishery. Therefore pending an ultimate disposition of this issue by the United States Supreme Court, we will follow Puyallup II and

undertake a consideration of the allocation question expressly called for by that case."
Supra, at 688:
"The first phase of our opinion is held in abeyance pending the final disposition of the treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary."

With the duality of the federal and state court systems, only this Court has the authority to resolve differences between the two court systems, and we respectfully request that this Court entertain jurisdiction and resolve the issues presented.

Response to Reservation Contention

The steelhead fishery occurs only in fresh water and the Indian net fishery is concentrated at the lower portion of the river. The hook-and-line fishery occurs in the same area and extends further up the river than does the net fishery. Hence, the treaty fishery has the ability to preempt the nontreaty fishery by virtue of having the first opportunity to harvest the migrating fish. The Puyallup Reservation originally consisted of approximately 18,000 acres, including nearly seven miles of the Puyallup River. The record indicates that only 22 of those 18,000 acres are held in trust status. (F.F. I, (XII), D-3) Furthermore, the original reservation area is populated primarily by non-Indian residents and a portion of the area is included within the city limits of the second largest city in the state of Washington. In *United States v. Washington*, 496 F. 2d 620 (9th

Cir. 1974), the question presented to the United States District Court was whether the Puyallup Reservation had been terminated or diminished. The District Court determined that the reservation had been terminated (which is consistent with the decision of the state trial court in Puyallup I) and therefore did not reach the issue of whether the reservation had been diminished in size. The Ninth Circuit reversed on the termination question and thus the question of diminishment has not been resolved.

The record establishes that the Puyallup Indians do fish at locations outside of the reservation, even if one assumes that the entire original reservation is intact. Since there is a fishery outside the reservation, the question must be resolved as to whether fish harvested within the reservation are to be included or excluded in the apportionment of the fish run between the treaty and nontreaty fishermen. The state courts have included such harvests, while the Ninth Circuit and the United States District Court in *U.S. v. Washington*, supra 520 F. 2d 676, 384 F. Supp. 312, excluded such harvests not only from the apportionment but from any consideration in the apportionment.

The trial court in *Puyallup III* (D-39-41) has made clear that even if a reservation exists for a seven-mile stretch of the Puyallup River the treaty cannot be construed to authorize the complete preempting of the fish run in the river, including hatch-

ery fish which are not subject to the treaty. The court emphasized the fact that these fish are migratory, destined for locations beyond the reservation and thus there must be an ability to protect those fish which are in excess of the apportionment made pursuant to the remand of this Court.

Further, as the trial court indicated, there is a need to protect for conservation purposes the migratory fish which traverse the reservation. Said protection is required, and as Justice Douglas stated for the Court in *Puyallup II*, *supra*, at 49:

> "The police power of the state is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."

We would respectfully submit that the petitioners' contentions re the reservation issue are not well-taken and, even if resolved in their favor, would not moot this proceeding and since the other issues previously referred to must be resolved.

Reexamination of Puyallup II, 414 U.S. 44

The Washington State Supreme Court has suggested that this Court reconsider the apportionment requirement decreed in *Puyallup II*, 414 U.S. 44. The State Supreme Court extensively discussed the construction of Article III, Treaty of Medicine Creek, *supra;* i.e., the right to fish in common with citizens of the state, and concluded after considering a number of dictionary definitions, the circumstances of the treaty, common understanding of the terms, and

prior court decisions, that "in common" means "belongs to the public" and thus the treaty granted the same rights to the treaty beneficiaries as those conferred upon citizens of the United States. Indians at the time of the treaty were not citizens nor were they entitled to the constitutional protections of the United States Constitution. (B-8-31; *Puyallup II*, 86 Wn. 2d, *supra*, at 669-381) The concurring opinion of the State Supreme Court further elaborated, reaching the same conclusions predicated in part upon an equal protection for other citizens of the state. See, *Puyallup II*, *supra*, 690-96 (D-50-58) The trial court in this proceeding also extensively discussed the nature and extent of the treaty right. (C-21-30, citing authorities and expressing conclusions similar to those of the State Supreme Court.) We recognize that the Court has ruled upon this issue in *Puyallup II*, 414 U.S. 44, but the State Supreme Court has suggested that the ruling of this Court may have been predicated in part upon a conclusion made by the State Supreme Court in *Puyallup II*, 80 Wn. 2d, *supra*, at 671, which the court has now decreed to have been in error.

Further, this Court in *Puyallup II*, 414 U.S. 44, assumed that the nontreaty fishermen preempted the steelhead fishery. It is clear from the record in this proceeding, including the testimony of the Puyallup tribal chairperson, that the Puyallup tribal Indians do participate in and are not preempted from the hook-and-line steelhead fishery. We would respect-

fully submit that the suggestion of the Washington State Supreme Court that this Court reconsider its apportionment ruling be granted.

CONCLUSION

If this Court grants certiorari it should consider the issues addressed by the Washington State Supreme Court rather than the limited issue presented by the petitioners which will not adequately resolve the litigation."[1] We make this request not on the contention that the state court has erred in its conclusions, but rather that review by this Court is necessary to avoid and minimize the on-going conflicts that are occurring between rulings of the State Supreme Court and the Federal District Court for Western Washington relating to these and associated matters. The authorities cited by the State Supreme Court and superior court, reflected in their opinions found in Appendices A and B, support the

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[1] We submit that pursuant to the authority of this Court as previously enunciated in *Legerlotz v. Rogers*, 361 U.S. 808 (1959) and *Neely v. Eby Construction Co.*, 382 U.S. 914 (1965), if certiorari is granted, it should include the following issues in its consideration:

1. When the state is required to apportion, between treaty tribal members and nontreaty fishermen, the harvesting of migratory fish, can fish produced by a state hatchery program be excluded from the apportionment on the basis that there is no treaty right to hatchery fish?

2. When the state is required to apportion, between treaty and nontreaty fishermen, the harvesting of migratory fish, can it protect those fish which exceed the treaty Indian share of the apportionment from being harvested by Indians even when the fish migrate across an Indian reservation?

3. Must the state, even when it permits all persons, both treaty beneficiaries and nontreaty persons, to participate on a nondiscriminatory basis in the fishery for migratory fish, nevertheless apportion the harvestable fish between the two groups? If so, what constitutes a reasonable apportionment?

conclusions expressed therein. We have not unduly lengthened this response by including those authorities.

We submit that limiting the review to that sought by the petitioners will not adequately deal with the problem, and if review is granted, it should include those issues which are set forth in footnote 14, on page 24.

DATED this 3 day of November, 1976.

Respectfully submitted,

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I hereby certify that on this 3 day of November, 1976, three copies of the respondent's Response and Cross-Petition to Petition for Writ of Certiorari and Cross-Petition were mailed, postage paid, to:

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counsel for petitioners. I further certify that all parties required to be served have been served.

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